

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LARCENA C. GILMORE)	
Claimant)	
VS.)	
)	
BOEING MILITARY AIRPLANES)	Docket Nos. 154,391
Respondent)	& 170,484
AND)	
)	
AETNA CASUALTY & SURETY COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

The Kansas Workers Compensation Fund files this Application requesting the Appeals Board to review an Award dated January 20, 1994, and a subsequent Nunc Pro Tunc Award concerning both of the above docket numbers, entered by Administrative Law Judge Shannon S. Krysl. The Appeals Board heard oral argument by telephone conference.

APPEARANCES

The claimant appeared by and through her attorney, Dale V. Slape of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Frederick L. Haag of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, John C. Nodgaard of Wichita, Kansas. There were no other appearances.

RECORD & STIPULATIONS

The Appeals Board considered the record and adopted the stipulations listed in the Award, including the stipulation that the Kansas Workers Compensation Fund shall be liable for eighty percent (80%) of all compensation benefits and costs ordered paid in both of the subject docket numbers.

ISSUES

The Kansas Workers Compensation Fund raised the following issues in regard to Docket No. 154,391:

- (1) Nature and extent of claimant's disability;
- (2) Claimant's entitlement to future medical benefits.

The Kansas Workers Compensation Fund raised the following issues in regard to Docket No. 170,484:

- (1) Whether claimant suffered a personal injury by accident arising out of and in the course of her employment with the respondent on the dates alleged;
- (2) Nature and extent of claimant's disability;
- (3) Claimant's entitlement to future medical benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After a review of the whole record and hearing arguments of the parties, the Appeals Board finds as follows:

Docket No. 154,391

(1) Claimant claims a work-related injury to her left knee on June 6, 1990, while employed by the respondent. Additionally, she claims injuries to her low back and right knee as a direct and natural consequence of her left knee injury. Respondent stipulates to the left knee injury but denies the low back and right knee injuries.

On the date of accident, June 6, 1990, claimant was employed by the respondent in light sheet metal subassembly. While claimant was rushing to an inspection table with a box of parts that she was about to drop, she struck her left knee on the handle of a metal trash can which was under the inspection table. She immediately felt excruciating pain in her left knee. This injury was reported to Boeing Central Medical and she was referred for

treatment to Forney W. Fleming, M.D., an orthopedic surgeon in Wichita, Kansas, on June 8, 1990.

Dr. Fleming had been treating the claimant since January 30, 1990, for a left knee injury which occurred in an automobile accident on October 20, 1988. Prior to the June 6, 1990 work-related accident, Dr. Fleming had last seen the claimant on May 31, 1990, restricting her to avoid kneeling and squatting and giving her a twelve (12) month handicapped parking permit because of the automobile accident injury. For the claimant's work-related injury, Dr. Fleming prescribed conservative treatment in the form of knee immobilizer, medication, crutches as necessary and to enter a Cybex knee rehabilitation program. Dr. Fleming last saw the claimant on September 13, 1990, when he opined that she had met maximum medical improvement. However, he did suggest that she return to Dr. Poole, who previously operated on her as a result of the automobile accident injury, for other suggestions. He restricted her to a sit-down job on a temporary basis and commented that this could become permanent.

Respondent next referred the claimant for further medical treatment to Robert L. Eyster, M.D., an orthopedic surgeon in Wichita, Kansas, on September 17, 1990. Dr. Eyster's impression was irritation in and around the knee area caused by chondromalacia of the inner surface of the kneecap. He restricted her to no climbing or repetitive squatting and no prolonged sitting. He prescribed an anti-inflammatory drug with the option for surgery utilizing the Maquet procedure in which the tubercle of the patellar tendon insertion is elevated. This procedure is to treat the chondromalacia from which the claimant suffers. Dr. Eyster opined that the claimant's pre-existing left knee condition resulting from the automobile accident was only temporarily aggravated by her work-related incident. He went on to conclude that the work-related incident caused no increase in permanent impairment of the left knee.

Claimant struggled off and on with her knee injury, being able to work for a period of time and then being off for a period of time, because of the continuing swelling and pain in her left knee. Respondent finally referred her to Bernard T. Poole, M.D., an orthopedic surgeon in Wichita, Kansas. Dr. Poole first saw the claimant on October 16, 1991, for her left knee condition. Dr. Poole had previously treated her from August 1989 through March 8, 1990, regarding her left knee following an injury as a result of the automobile accident. He performed a lateral patella retinacular release and debridement of the areas of damage of the articular cartilage on September 14, 1989. In March of 1990, he released her, opining that she had reached a stage of stability with a twenty-five percent (25%) permanent partial disability of the left knee. He suggested that she wear a knee brace and restricted her to a single lift of fifty (50) pounds and limited standing of four (4) hours per day.

As a result of her latest work-related knee injury, Dr. Poole ordered a bone scan, an MRI, and took the claimant off work as she was on crutches at that time. Through 1991 and the early part of 1992, the claimant continued with significant patella femoral

degeneration symptoms and Dr. Poole continued conservative treatment. She also started complaining of symptomatology in her right knee and low back. However, Dr. Poole never found a satisfactory orthopedic explanation for these symptoms. As conservative treatment was not improving claimant's condition, on March 30, 1992, Dr. Poole performed a Maquet's osteotomy to maximally decompress the patellar femur joint. This surgical technique is an attempt to relieve some of the pressure from the erosion on the back surface of the patella. The claimant progressed quite well after surgery. Claimant showed significant improvement in the degree of chondromalacia of the patella. Dr. Poole's opinion in reference to claimant's functional disability was thirty percent (30%) of the left lower extremity because of her patella femoral degenerative changes. He also gave an opinion in reference to the claimant's functional impairment, as a result of the injury to the left knee because of the automobile accident, which was twenty-five percent (25%) of the left lower extremity. It was Dr. Poole's opinion that the trauma described by the claimant when she struck the trash can handle at work could have caused a worsening of the patella chondromalacia. Permanent work restrictions of no work involving standing over four (4) hours, no climbing, kneeling or squatting were placed on claimant by Dr. Poole in a report dated October 19, 1992. Dr. Poole, on the date of his deposition, June 8, 1993, still had the claimant under his care.

An independent medical examination and evaluation of the claimant was performed by Robert A. Rawcliffe, M.D., a board-certified orthopedic surgeon in Wichita, Kansas, on January 7, 1991. Dr. Rawcliffe took a history from the claimant, which included her automobile accident in 1988 and subsequent surgeries performed by Dr. Artz and Dr. Poole. Claimant also related to Dr. Rawcliffe that she re-injured her left knee while working for the respondent on June 6, 1990. However, Dr. Rawcliffe only examined the claimant once and that was on January 7, 1991, which was prior to Dr. Poole's final surgery on the claimant's left knee performed on March 30, 1992. Dr. Rawcliffe concluded that the claimant had not recovered from injuries received to her left knee in the 1988 automobile accident and subsequent surgeries, when she re-injured her knee at work on June 6, 1990. He opined that claimant's present functional impairment of her left lower extremity was twenty-five percent (25%). Permanent restrictions were given of no work requiring bending, stooping, kneeling or squatting, or any prolonged standing or walking. He thought additional surgical treatment would be required, probably in the form of a patellectomy. Dr. Rawcliffe expressed no opinion in reference to the claimant's right knee or low back complaints. Dr. Rawcliffe also did not have an opinion on whether the June 6, 1990 incident at work increased the claimant's functional impairment or need for additional medical restrictions.

Claimant also was examined and evaluated, at her attorney's request, by Ernest R. Schlachter, M.D., on February 4, 1993, concerning permanent functional impairment and permanent restrictions. Dr. Schlachter took a history from the claimant which revealed multiple surgeries to her left knee with degenerative changes. The history also revealed injuries to claimant's low back. Dr. Schlachter's diagnosis was chronic lumbosacral sprain and meniscus injury with degenerative changes of the left knee. With respect to functional

impairment, Dr. Schlachter combined the left lower extremity rating with the lumbar spine rating for a twenty-one percent (21%) whole body functional impairment. He opined that future surgeries would be needed on the left knee. Permanent restrictions were given of limited walking and standing, no kneeling or squatting, no carrying more than fifteen (15) pounds for short distances, no lifting more than twenty-five (25) pounds and she should obtain a job where she can sit part-time and stand part-time. Because of the substantial permanent impairment of function that the claimant had due to her automobile accident prior to June 1990, Dr. Schlachter opined that he would have placed the same permanent medical restrictions on her then as he has expressed from his present examination. Even though the June 6, 1990 incident was minor, Dr. Schlachter opined that the trauma, and the effect of that trauma on the claimant's pre-existing knee condition, aggravated the condition and made it worse which caused her to undergo further medical treatment. Dr. Schlachter also was of the opinion that the claimant's knee injury caused her to limp which caused abnormal stress on her back and resulted in a permanent injury to her back. Her limp, due to her left knee injury, precludes the back from healing.

The Administrative Law Judge, in the case at hand, found that the claimant suffered both a left knee injury and a low back strain that arose out of and in the course of her employment with the respondent. She awarded claimant a permanent partial general disability of sixteen percent (16%) based on the combined functional impairment ratings of Dr. Poole's thirty percent (30%) of the left lower extremity and Dr. Schlachter's eight percent (8%) rating related to the claimant's low back condition. Without comment, the Administrative Law Judge rejected claimant's request for work disability.

The respondent takes the position, in this case, that the evidence has only established that the claimant has suffered an injury to her left knee only. Accordingly, the appropriate award should be based on the loss of use of the claimant's left lower extremity as set forth in K.S.A. 44-510d(a)(16). The respondent argues that the appropriate percentage of loss of use should be the difference between Dr. Poole's functional impairment rating of twenty-five percent (25%) prior to claimant's work-related accident and his thirty percent (30%) opinion after the claimant's work-related accident, for a five percent (5%) loss of use of the claimant's left lower extremity. The Kansas Workers Compensation Fund, on the other hand, argues that the claimant has not met her burden of proof in establishing that she suffered an accidental injury while working for the respondent. The Kansas Workers Compensation Fund points out that all the treating physicians concluded that the claimant's physical problems were a result of injuries received in an automobile accident in 1988 and not a work-related accident of June 6, 1990.

The Workers Compensation Act places the burden of proof squarely upon the claimant to establish her right to an award of compensation and to prove the various conditions on which her right to recovery depends. K.S.A. 44-501(a). The claimant has the burden to present, by a preponderance of the credible evidence, that her position on an issue is more probably true than not true on the basis of the whole record. K.S.A. 44-508(g). In this case, the Appeals Board, after carefully examining the entire evidentiary

record, finds that the greater weight of the credible evidence entitles the claimant to an award based on a thirty percent (30%) loss of use of the claimant's left lower extremity only. Having found that the claimant's injury is confined to her left lower extremity, a scheduled injury, the work disability question raised by the claimant is moot.

A total of six (6) physicians testified in this case. Four (4) of the physicians provided some medical treatment for the claimant and two (2) of the physicians were not treating physicians and provided only testimony on functional impairment and permanent restrictions. However, only one (1) physician, Dr. Poole, operated on claimant's left knee before and after her work-related injury. Dr. Poole provided claimant with the most comprehensive medical treatment. Therefore, the Appeals Board finds that he is the physician that is most familiar with the claimant's past and present medical condition. Accordingly, the Appeals Board, as the trier of fact, after reviewing the testimony of all physicians, finds that Dr. Poole's testimony is the most credible and accurate and should be given the most weight in deciding this matter. See Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991). Dr. Poole, reluctantly, testified that the trauma the claimant described to him that occurred on June 6, 1990, at work, worsened the claimant's pre-existing patella chondromalacia. He further opined that prior to this incident, the claimant had a twenty-five percent (25%) permanent partial functional impairment of her left lower extremity and after the work-related incident she had a thirty percent (30%) permanent partial functional impairment. If a worker's pre-existing condition is aggravated by a subsequent work-related injury, resulting in disability, the worker is entitled to be compensated for the total resulting disability. Cox v. Ulysses Cooperative Oil & Supply Co., 218 Kan. 428, 544 P.2d 363 (1975). Therefore, the Appeals Board concludes it appropriate to award the claimant in this case a thirty percent (30%) loss of use of the left lower extremity.

Claimant claims the evidence herein supports a finding that her low back pain and right knee pain are a direct and natural consequence of her injured left knee and, thus, compensable. If a new injury is a direct and natural result of the primary injury, the new injury is compensable. See Chinn v. Gay & Taylor, Inc., 219 Kan. 196, 547 P.2d 751 (1976). However, Dr. Poole's testimony is very clear that despite the claimant's complaints of problems in her back and right knee, he found no evidence of organic pathology or a satisfactory orthopedic explanation for the complaints.

(2) In regard to the question of claimant's need for future medical treatment, the Appeals Board finds that there is credible medical evidence contained in the record to award future medical treatment upon proper application to the Director of Workers Compensation.

Docket No. 170,484

The claimant, in this separate docket number, makes a claim for workers compensation benefits due to alleged injuries she received to her low back and right knee

while she was performing her normal work activities for the respondent from September 21, 1992 through October 23, 1992. After the claimant's left knee surgery in March 1992, she first returned to work for the respondent in September 1992. She testifies that she was unable to work every day after her return because of continuing pain and swelling in her left knee, right knee and pain in her low back. During this period of time, Dr. Poole was still her treating physician and, in fact, when Dr. Poole's deposition was taken on June 8, 1993, he remained the claimant's treating physician. Dr. Poole was asked if he had an opinion within a reasonable degree of medical probability as to whether the claimant had sustained any type of work-related injuries to her back or her right knee and he answered as follows:

"I can find no evidence of any pathology in these two areas which could be related to any type of trauma."

The Appeals Board, based on Dr. Poole's opinion, finds that the claimant did not suffer an accidental injury to her low back and right knee that arose out of and in the course of her employment while working for the respondent from September 21, 1992 to October 23, 1992.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl, dated January 20, 1994, and subsequent Nunc Pro Tunc Award, is hereby modified as follows:

Docket No. 154,391

AN AWARD OF COMPENSATION IS HEREIN ENTERED IN FAVOR of the claimant, Larcena C. Gilmore, and against the respondent, Boeing Military Airplanes, and its insurance carrier, Aetna Casualty & Surety Company, and the Kansas Workers Compensation Fund, for an accidental injury sustained on June 6, 1990, and based on an average weekly wage of \$583.20. Claimant is entitled to 91.7 weeks of temporary total disability compensation at the rate of \$271 per week or \$24,850.70, followed by 32.49 weeks at \$271 per week for a total of \$8,804.79 for a 30% permanent loss of use of the claimant's left lower extremity, making a total award of \$33,655.49.

As of April 18, 1995, there is due and owing claimant 91.7 weeks of temporary total disability compensation at the rate of \$271 per week or \$24,850.70, plus 32.49 weeks of permanent partial disability benefits at \$271 per week, in the sum of \$8,804.79, for a total due and owing of \$33,655.49, which is ordered paid in one lump sum less any amounts previously paid.

Per stipulation, the Kansas Workers Compensation Fund is ordered to pay eighty percent (80%) of all compensation benefits, medical expenses and costs incurred in this claim.

Future medical treatment is awarded only upon application to the Director of Workers Compensation.

Docket No. 170,484

The Appeals Board finds that the claimant did not suffer an accidental injury to her low back and right knee arising out of and in the course of her employment, therefore, claimant is denied all compensation in this docketed matter.

All other findings of Administrative Law Judge Shannon S. Krysl, as set forth in her Award of January 20, 1994, and subsequent Nunc Pro Tunc Award, are incorporated herein to the extent that they are not inconsistent with the findings and conclusions expressed in this Order.

IT IS SO ORDERED.

Dated this ____ day of April, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Wichita, KS
Frederick L. Haag, Wichita, KS
John C. Nodgaard, Wichita, KS
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director